THE SUGAR BOUNTIES.

IT is difficult to avoid the conclusion that, whatever be the decision of the Supreme Court in the recent cases on the "McKinley Bill," it will have as far-reaching an influence as any since Dred Scott's. The cases[1] are ordinary importers' appeals from duties illegally assessed. One is a sample of both. Take No. 1050. The plaintiffs, Sternbach & Co., on October 7, 1890, entered at the port of New York certain colored cotton goods of a number of threads to the inch and a valuation such that under the Act of March 3, 1883 (22 Stats. at Large, 488), they would have been dutiable at 40 per cent. *ad valorem*. Under the Act of October 1, 1890 (26 Stats. at Large, 567, 591), the duty of 45 per cent. was assessed and paid on these goods. The grounds of appeal all involve the same point — that the Statute of 1883 is still in full force and not repealed by the subsequent Act of 1890, for the short reason that the latter is void.

The reasons alleged in the various stages of the appeal are three. (1.) The Act signed by the President as the Act of October 1, 1890, was not the Act which passed the two Houses of Congress, and therefore was not enacted in conformity with the provision of the Constitution (Const. U. S., art. 1, sec. 7, cl. 3). (2.) The Act in its so-called "Reciprocity Clause" purports to authorize the President to reimpose taxes upon certain articles under circumstances amounting to a delegation of legislative functions to the executive. (3.) It provides for the payment from the Treasury of bounties to the producers of domestic sugar.[2]

Each of these three grounds of objection opens up an inviting field for investigation. Of the three, the last seems of greatest importance, in that it indicates a marked and persistent

[1] No. 1049, Robert M. Boyd *et als. v.* United States; No. 1050, Charles Sternbach *et als. v.* United States; represented respectively by Currie, Smith & Mackie and Messrs. Stanley, Clarke & Smith, both of New York.

[2] A fourth case, No. 1061, U. S. *v.* Ballin, Joseph & Co., also represented by Messrs. Stanley, Clarke & Smith, is based largely upon the alleged legal inability of Speaker Reed to count a quorum among members of the House of Representatives who declined to respond to the roll-call, during the passage of that section of the McKinley Bill involved in the appeals.

tendency in recent legislation. The decision of its legality will naturally check or vastly increase its force and velocity.

Apparently the first two grounds of the importers' protest, however well founded in fact or law, are, to a certain extent, of a transient or accidental nature. Not so the question of the constitutionality of sugar bounties, first provided for in this bill. The sections of the Act of October, 1, 1890, relating to this subject read substantially as follows:

That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar-cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.[1] And for the payment of these bounties the Secretary of the Treasury is authorized to draw warrants on the Treasurer of the United States for such sums as shall be necessary, which sums shall be certified to him by the Commissioner of Internal Revenue, by whom the bounties shall be disbursed, and no bounty shall be allowed or paid to any person licensed as aforesaid in any one year upon any quantity of sugar less than five hundred pounds.[2]

Certain things may be noted on the surface of these sections.

First. The subject-matter is *taxation.*

As the able government brief (by Attorney-General W. H. H. Miller and Solicitor-General William H. Taft) puts it (p. 65):

It may be conceded that the bounty must be paid out of the Treasury of the United States from funds raised by taxation and therefore that, unless Congress has power to levy a tax for the purpose of paying the bounty, an appropriation for a bounty is beyond its power.

Second. Individuals are the sole direct recipients of the taxation. The money goes from the taxpayer, through the Treasury, directly to the sugar-raiser, to increase his profits.

The government's attorneys say:

The sugar-bounty clause was for the purpose of encouraging the production of raw sugar in this country (p. 59). It will be noted also

[1] Schedule E, 231. [2] Schedule E, 235.

that the sugar bounty is not payable to any particular individuals, but that to any one who may care to invest the time and capital in the growing and manufacture of raw sugar the offer of the government is open. . . . As will be seen from the records of the Internal Revenue Bureau, the number of applicants for bounty under this law is about five thousand, and they are distributed over twenty-four States (p. 72).

It may be assumed that (apart from its previous revenue conditions as a "protected" article) the industry of raising raw sugar differs in no essential particular from any of the other innumerable industries in the country. The question fairly raised on this branch of these cases therefore is this: Has Congress the constitutional power to tax the people of the United States for the purpose of raising money with the direct object of giving it away to persons engaged in a particular industry, in order to encourage them to continue or expand it?

Let us take this as a subject for brief examination.

In looking over the field, the inquiry seems naturally to divide itself into three questions:

I. For what purposes is taxation legal?

II. How have these purposes been defined?

III. Does the Federal Constitution confer on Congress additional powers?

I.

PURPOSES OF TAXATION.

They are easily stated. Taxation can only be for a "public purpose." Judge Cooley (Law of Taxation, p. 55) lays it down that

It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose.

Again (*Ibid.*, p. 103):

It is implied in all definitions of taxation that taxes can be levied for public purposes only. Differences of opinion frequently arise concerning the power to impose taxation in particular cases, but all writers who treat the subject theoretically and all jurists agree in the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question whether the particular purpose proposed is within the requirement.

There is, of course, abundant authority for this elementary proposition.

In an early Pennsylvania case[1] it is said that

> The common mind everywhere has taken in the understanding that taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations; that they are imposed for a public purpose.
>
> We have established, we think beyond cavil that there can be no lawful tax which is not laid for a public purpose. (Loan Association *v.* Topeka, 20 Wall., at p. 664.)
>
> Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes. (Allen *v.* Inhabitants of Jay, 60 Maine, 124, 127.)
>
> A tax is an impost levied by authority of government upon its citizens or subjects for the support of the State. (Camden *v.* Allen, 2 Dutch. 398.)
>
> No authority nor, as I believe, even dictum can be found which asserts that there can be any legitimate taxation where the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the public governmental divisions of the State. (Hanson *v.* Vernon, 27 Iowa, 28, 47.)
>
> Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them. (Sharpless *v.* Mayor, 21 Pa. St. 147, 169.)[2]

It may be remarked, parenthetically, that the importance of some such limitation upon the government's right to tax as that the purpose of taxation should be public cannot be overestimated. The whole fabric of society, as at present constituted, rests upon the private ownership of property. In other words, it is fundamental that what a man earns or lawfully acquires is his property, and that among the objects of the law is that of protecting him in this ownership. In society organized upon socialistic or nationalistic principles, all property is at the disposal of the government. There is no private property. So long, however, as our present society continues to exist, at its basis lies the institution of private ownership. Government has, for certain purposes and by certain methods, including that of taxation, the right to take from the citizen, against his will, a portion of his property. If this right were unlimited, the citizen would hold property not

[1] Northern Liberties *v.* St. John's Church. 13 Pa. St. 104, per Coulter, J.

[2] Norris *v.* Waco, 57 Tex. 635, 640; In matter of Market Street, 49 Cal. 546; Hooper *v.* Emery, 14 Me. 375, *accord.*

under the protection of the government, but at its mercy. A society so constituted would differ in no essential particular either from socialism or despotism. Indeed, as has been said by Mr. Justice Miller (Loan Association *v.* Topeka, 20 Wall., at p. 662):

> It must be conceded that there are such rights in every free government, beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.[1]

II.

"PUBLIC PURPOSE."

In general, there is little difficulty in deciding what purposes are public. In town or city affairs, "roads are made and kept in repair, school-houses are built and salaries paid to teachers, there are constables to take criminals to jail, there are engines for putting out fires, their are public libraries, town cemeteries, and poor-houses." In State affairs, courts are to be maintained, laws enacted and enforced, judges and State officials paid, jails and prisons maintained, etc. These are public purposes for the obvious reason that the public receives the direct and immediate benefit.

This is the first class of cases. All taxation, however, is not so free from the alloy of private interest. The lay-out of a thoroughfare, for example, may be most directly beneficial to certain individuals. Their lands are made accessible, or possibly for the first time brought into market. Cases are readily supposable where the advantage to individuals must greatly exceed the advantage accruing to the general public. But still the taxation is for a public object. The direct purpose of the expenditure is public — the lay-out of a highway. The general public enjoy legal rights in and advantages from the new street. The mere fact

[1] See, also, Sharswood, Legal Ethics, xix–xxii.

that incidentally certain particular members of the public receive therefrom private advantages not shared by their fellows cannot affect the propriety of the expenditure. Given a public object for which to tax, the extent and circumstances of any particular expenditure are matters of legislative discretion, and if exercised to the undue benefit of private persons the remedy is political.[1]

An easy illustration of this second class of cases is the grant of state or municipal aid to the construction of railroads. The entire contention has been as to whether the purpose was public. It has been urged, by those who took the affirmative of the proposition, that railroads are analogous to highways. It has been pointed out that the construction of a railroad is a sufficiently public purpose to enjoy the benefit of the State's power of eminent domain; that the obligation of a railroad is that of a common carrier, and so subject to rights on the part of the general public; that the tolls are subject to legislative control, and that railroads furnish means of communication essential to the public interest. It has been contended, and the contention has been largely accepted as correct,[2] that therefore, although, as the objectors allege, the direct recipient is an individual or corporation, and the public money therefore goes in the first instance to swell private profits, that still the essential object is, after all, a public one. It will be noted, however, that in the leading case of Rogers *v.* Burlington (2 Wall. 654) a strong minority (consisting of the Chief Justice and Field, Grier, and Miller, JJ.) dissented, and further that such a power of taxation has been steadily resisted in many well-considered cases.[3]

In Loan Association *v.* Topeka (20 Wall., at p. 662) it is said that "Of the disastrous consequences which have followed its recognition by the courts, and which were predicted when it was first established, there can be no doubt."

It is also notorious that many States have been forced to prohibit or restrict such loans in their subsequent constitutions.

It is generally thought, moreover, that in this class of cases the

[1] Lowell *v.* Boston, 111 Mass. 454; People *v.* Salem, 20 Mich. 452.

[2] Rogers *v.* Burlington, 3 Wall. 654; Queensbury *v.* Culver, 19 Wall. 83; Taylor *v.* Ypsilanti, 105 U. S. 60; Sharpless *v.* Mayor, 21 Pa. St. 147; Olcott *v.* Supervisors, 16 Wall. 678; R.R. Co. *v.* Davidson, 1 Sneed, 637; Opinion of Justices, 58 Me. 590, 604.

[3] Hanson *v.* Vernon, 27 Iowa, 28; Whiting *v.* R.R., 25 Wise, 166; People *v.* Salem, 20 Mich. 452; People *v.* Treasurer, 23 Mich. 499; see, also, Jenkins *v.* Andover, 103 Mass. 94; Talbot *v.* Hudson, 16 Gray, 417.

legislature has been permitted to go to the extreme limit of the law, and all these decisions have clearly recognized the principle that taxation can only be for a public purpose.

The difficult case is neither that of a public expenditure for the equal general benefit, nor of a public expenditure with incidental private advantage, but that of an expenditure for the direct benefit of individuals with an incidental public gain. In other words, it is not the case of the highway for the general good, nor of one owned and enjoyed by the public while incidentally affording exceptional private benefit. It is, as it were, building private avenues at public expense, from which individuals directly benefited exclude the public, in order that the public may derive incidental advantage from the increased prosperity of the individuals benefited, through their enhanced ability to pay wages or taxes upon increased valuations.[1] Cases, indeed, may be supposed in which this incidental public gain is actual, and productive of immense general advantage; an advantage sufficiently great to make the original investment of public money profitable, in the business sense. Apparently, it is this class of cases which we are considering in these sugar bounties. Is such an expenditure for a "public purpose"?

This question the uniform current of authority in State and Federal courts has answered in the negative. As relates to State governments, tax appropriations for the direct benefit of individuals to reach an incidental public advantage are beyond the legislative power. Whether the same rule applies to Congress will be considered later. But in State affairs, wherever the incessant activity of those who ask direct private gain under promise of indirect public advantage is incorporated into legislation, such legislation is void. Under any of its Protean forms, however disguised, if it can be detected that an application has been made of public moneys for the primary benefit of individuals, courts have shown themselves astute in following and defeating the substance of the arrangement.

The language of these cases is free from ambiguity. They are familiar, but worthy of review. In citing them we avail ourselves of the careful summaries contained in the briefs of the importers' counsel. In Massachusetts a well-considered opinion is that given in the leading case of Lowell *v.* Boston (111 Mass. 454).

[1] See Morse *v.* Stocker, 1 All. 150.

By Statute 1872, chap. 364, the city of Boston was authorized, at a session of the legislature called largely for that purpose, to issue bonds to the amount of $20,000,000, the proceeds to be loaned to persons whose property had been destroyed by the great Boston fire, under conditions carefully conceived for the security of the loan.

The situation is graphically described in the argument of the eminent counsel for the city (Hon. B. R. Curtis and J. G. Abbott, Esqs.):

> The main questions in the case are these: Can there be such a destruction of property by fire in the capital city of the State, the main seat and centre of its wealth, industry, commerce and business, the prosperity and advance of which are so intimately connected with its own, that the one cannot be touched without seriously affecting the other, as to justify the State in lending money to those whose property has been destroyed, upon ample security, to enable them to restore the city to its former condition? Can there be so general a calamity and destruction by fire, in a city owning more than a third of the taxable property of the State, and paying more than a third of the taxes for public purposes, as would justify the State, upon prudential considerations, in lending a helping hand for the purpose of preserving her own resources and the mainsprings of her own prosperity? Can there be a destruction of property in such a city, by fire, so serious and calamitous as to interfere with the business of the people, the interests of labor, and the finances of the whole community, to such a degree as to justify the legislature in bringing to the aid of the sufferers a loan from the State, to avert some, at least, of the great public loss and suffering that would be occasioned by such a calamity?

The Act, nevertheless, was held unconstitutional. The court hold:

> The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interest of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax,

and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. . . . An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.[1]

Substantially the same state of facts arose after the Charleston (S. C.) fire, and a similar statute was declared unconstitutional. (Feldman *et al v.* City Council, 23 S. C. 57.)

In Maine, the same proposition has been laid down. The Supreme Court of that State were asked by the House of Representatives for their opinion on this question:

Has the legislature authority under the constitution to pass laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds within or without the limits of said towns? And if towns thus authorized may assist private parties, may they go further and establish manufactories entirely on their own account, and run them by the ordinary town officers or otherwise?

In answering in the negative, the court (Opinion of Justices, 58 Me. 590) use the following language:

Individuals and corporations embark in manufactures for the purpose of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic, or the day laborer. They engage in the selected branch of manufactures for the purpose and with the hope and expectation, not of loss, but of profit. The general benefit to the community resulting from every description of well-directed labor is of the same character, whatever may be the

[1] Atty. Gen. *v.* Boston, 123 Mass. 460, 470; Agawam *v.* Hampden, 130 Mass. 528; Opinion of Justices, 150 Mass. 592, *accord.*

branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the State by increasing the aggregate of its products — its wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts than the sailor, the mechanic, the lumberman, or the farmer.

The State cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The State is equally to protect all, giving no undue advantages or special or exclusive preferences to any. (p. 593.)

Can a tax be constitutionally imposed by municipal corporations to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom? (p. 603.)

In Allen *v.* Jay (60 Me. 124), the facts were that the town of Jay had in its town meeting voted to loan $10,000 to a firm of manufacturers, on condition that they would move their works to Jay and establish and maintain them there for ten years, the town to be repaid and the loan to be amply secured by a mortgage on the mill property. This vote was ratified by an Act of the legislature (1871, chap. 716). In declaring the Act void, the court (per Appleton, C. J.) state the proposition thus:

Ultimately, it will be found that the question resolves itself into an inquiry whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine. . . . (p. 127.) While the State is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries at the cost and charge of the rest of the community. . . . (p. 130.) The alleged justification for raising money to be loaned to private individuals for their own profit arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected, the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. . . (p. 131.) Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them, or of loaning them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate, and his savings are confiscated. If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry, thereby aided, and is one adverse to and against all individuals, all industries, not thus aided. If it is to be loaned at all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected. . . . (p. 132.)

The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned,

would be to withdraw it from the protection of the Constitution and submit it to the will of an irresponsible majority. It would be robbery and spoliation of those whose estates, in whole or in part, are thus confiscated. No surer or more effective method could be devised to deter from accumulation — to diminish capital, to render property insecure, and thus to paralyze industry. (p. 142.)

The same rule obtains in New York. In Weismer *v.* Douglas (64 N. Y. 91), for example, the court held void an Act of the legislature authorizing the village of Douglas to take stock in a manufacturing corporation, and to issue bonds to raise the money to pay for such subscription, and to levy and collect taxes for the payment of the principal and interest on said bonds. To the contention that this was a public purpose, in that the growth of the community would be advanced by manufacturing prosperity, the court (Folger, J.) say:

It may also be conceded that that is a public purpose, from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right.[1]

In the case of Sweet *v.* Hulbert (51 Barb. 316), Judge James, in speaking of such an attempt, holds as follows:

If this can be done, it is legal robbery; less respectable than highway robbery, in this, that the perpetrator of the latter assumes the danger and infamy of the act, while this act has the shield of legislative irresponsibility.

In Michigan, similar results are arrived at. An incidental treatment of the "bounty" question by Judge Cooley (People *v.* Salem, 20 Mich. 452) is interesting in this connection (p. 486):

In the course of the argument of this case allusion was made to the power of the State to pay bounties. But it is not in the power of the State, in my opinion, under the name of a bounty or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law of which this is the real nature is void, whatever may be the pretence on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions, stands upon a different footing altogether; nor have I any occasion to question the right to pay

[1] Matter of application, 96 N. Y. 42; Sweet *v.* Hulbert, 51 Barb. 316, *accord.*

rewards for the destruction of wild beasts and other public pests; a provision of this character being a mere police regulation. But the discrimination by the State between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, and no further. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak interest only that can give plausible reasons for public aid; when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger.

The Wisconsin cases adopt the same view. In Attorney-General *v.* Eau Claire (37 Wis. 400), the facts were similar. An Act had been passed by the legislature authorizing the Common Council of the city of Eau Claire to construct a dam across the Chippewa river, and lease the same for private purposes, and to issue bonds to pay for the same. The Act was held unconstitutional. The court say:

> We cannot hesitate in holding, what was not questioned at the bar, that, if the statute under consideration grant power to the city to construct and maintain the dam for the purpose of leasing the water-power for manufacturing purposes, it is a power for a private and not a public use, and cannot be upheld.[1]

The courts of Kansas are in accord. In State *v.* Osawkee (14 Kan. 418), the court was called to pass upon the validity of an Act (Stat. Kan., 1875, ch. 42) authorizing townships to issue bonds to provide the destitute citizens of certain townships with provisions and with grain for seed and feed. The act was called forth by a failure of the crops, partial or total, in many parts of the State, and entailing great suffering. The statute was held unconstitutional. Mr. Justice Brewer says:

[1] Curtis *v.* Whipple, 24 Wis. 350; Mather *v.* Ottawa, 114 Ill. 659; Coates *v.* Campbell, 37 Minn. 498, *accord.*

The credit of the township is invoked to procure funds for the accommodation of a single class temporarily and through unexpected calamity embarrassed in the prosecution of its ordinary business. Can this be called a public purpose? Clearly not. It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them in their farming, why may not one hundred mechanics with equal propriety receive seventy-five dollars each to assist them in their business, or a single manufacturer who employs one hundred hands receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle.

The same point was decided the same way in the case of Railroad Co. *v.* Smith (23 Kan. 745), where the court were called to pass upon the validity of a statute (Laws of 1873, ch. 51) authorizing Blue Rapids township to take stock in and issue bonds to the Irving Manufacturing Company, a corporation then organized, whose purpose, as expressed in its charter, was to purchase all needed lands, and construct and maintain a dam across the Big Blue river, within two miles of Irving, and build and maintain mills and their machinery for manufacturing purposes. The Act was held unconstitutional.

The court, through Mr. Justice Brewer, says (page 755):

> Public aid to private purposes cannot be secured by yoking them to a public purpose. And where the public and private purposes are attempted to be aided by a single concession, the latter vitiate, rather than the former uphold the grant.[1]

The decisions of the federal courts on this point are to the same effect. In 1873 the question came before Mr. Justice Dillon, in the Eighth Circuit, in the case of Commercial Bank *v.* City of Iola (2 Dill. Circ. Ct. Repts. 353). An Act of the legislature of Iowa purported to authorize the city of Iola to appropriate $50,000 to aid in the erection of buildings at or near the city of Iola, to be used for the purpose of manufacturing bridges,

[1] But see Burlington *v.* Beasley, 94 U. S. 310, where taxation in aid of a public grist-mill, the tolls of which the legislature would have a right to regulate, was sustained. Possibly in a new country such a mill would be a public necessity analogous to a railroad, and impossible without public aid.

plows and stoves, and for that purpose to issue bonds and levy taxes to pay the principal and interest of the bonds. The Act was adjudged unconstitutional. In the course of a well-considered opinion, Judge Dillon says :

> Taxation to aid ordinary manufactories or the establishment of private enterprises is a device until recently quite unheard of, and the power must be denied to exist unless all limits to the appropriation of private property and to the power to tax be disregarded. The question under discussion must be determined upon some principle, and I hold it to be sound doctrine that the mere incidental benefits to the public or the State which result from the pursuit by individuals of ordinary branches of business or industry do not constitute a public use in a sense which justifies the exercise of either the power of eminent domain or of taxation.
>
> If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character.

Perhaps the most weighty (certainly the most quoted) opinions on this subject have been given in the Supreme Court itself. A classic in this branch of the law is the Loan Association *v.* Topeka (20 Wall. 655). In that case the legislature of Kansas had passed an Act purporting to "authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water-power and other works of internal improvement." Under this Act the City of Topeka issued one hundred bonds for $1,000 each, and gave them as a donation to a company for the manufacture of iron bridges, "to encourage that company in its design of establishing a manufactory of iron bridges in that city." Mr. Justice Miller, in delivering the substantially unanimous opinion of the court that the Act was void, expressed himself with sufficient clearness to justify, it is hoped, the following extract :

> The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of the governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may lawfully be used, and the extent of its exercise is in its nature unlimited. It is true that express limitation on the amount of tax to be levied on the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of gov-

ernment, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government. The power to tax is, therefore, the strongest, the most pervading, of all the powers of government, reaching directly or indirectly to all classes of the people. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it on favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat-owner, are equally the promoters of the public good and equally deserving the aid of the citizen by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

The later cases in the United States courts adopt the same view of the law. In Parkersburg *v.* Brown (106 U. S. 487), an Act had been passed by the legislature of West Virginia authorizing and empowering the authorities of the city of Parkersburg to issue bonds for the purpose of lending the same to manufacturers carrying on business in or near said city. This court held the Act void, saying, per Mr. Justice Blatchford:

> But we are of the opinion that, within the principles decided by this court in the case of Loan Association *v.* Topeka, 20 Wall. 655, the bonds in question here are void. The Act of 1868 authorizes the bonds to be issued as the bonds of the city. The principal and interest are to be paid by the city. The bonds are to be lent to persons engaged in manufacturing. . . . It is taxation which takes the private property of one person for the private use of another person.

In Cole *v.* LaGrange, 113 U. S. 1, the case turned on an Act passed by the legislature of Missouri authorizing the city of LaGrange, whenever two-thirds of the resident taxpayers signified their approval thereof at a special election, to levy a tax not exceeding two per cent. per annum on the assessed valuation of the real and personal property in the city, to pay for a donation or

subscription to the stock of a railroad or manufacturing company. The court held the Act void. The opinion, written by Mr. Justice Gray, of Massachusetts, uses the following language:

> The general grant of legislative power in the Constitution of the State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject. . . . We have been referred to no opposing decision.[1]

There seems, as stated in the last case, no authority to the contrary. Indeed, as is said in the Topeka case (20 Wall., at p. 664), the proposition — that taxation can only be for a public object, and that where the direct and primary benefit goes to an individual any incidental public advantage from the existence or prosperity of this individual or his industry cannot make such taxation for a public object — is really settled by the meaning of words, by a resort to the dictionary. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government *for the use of the Nation or State.*" It seems clear, therefore, that were the sugar bounties matter of State legislation, they would be unconstitutional under the unanimous weight of American authority. If the judicial reserve of courts of last resort in important States is so far shocked by a concealed and guarded benefit to an individual or industry from the general tax-fund as to force the use of such ugly words as "robbery," "despotism," "confiscation," "spoliation," "usurpation," "communism," "plunder," "favoritism," etc., it can hardly be supposed that so bald an arrangement as a bounty would be considered an exception to the rule.[2]

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[1] Same case, 19 Fed. Rep. 871.

[2] Bissell *v.* City, 64 Ill. 249; English *v.* People, 96 Ill. 566; State *v.* Foley, 30 Minn. 350; Curtis *v.* Whipple, 24 Wis. 350; Brick Co. *v.* Brewer, 62 Me. 62; Iron Works *v.* Moundsville, 11 W. Va. 1; Trustees of Brooke Academy *v.* George, 14 W. Va. 411, 425; McConnell *v.* Hamm, 16 Kan. 228, *accord.*

III.

POWERS OF CONGRESS.

We have largely heretofore been repeating the position of the importers' counsel. It is time to examine the contention of the government on this branch of its case.

Briefly stated, the defence of the government rests upon four contentions:

1. Congress has power to levy taxes for the "general welfare."
2. The State authorities have no application.
3. Congress has exercised similar powers for many years without objection.
4. Congress has given the benefits of "protection" to certain industries, including sugar-raising, and fairness requires an equal bounty to the beneficiary upon the removal of the tax.

1. *"General Welfare" Clause.*

Section 8 of Article I. of the Constitution provides that

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and *general welfare* of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

This has been interpreted to mean that the power of taxation is limited to the purposes of paying the debts and providing for the common defence and general welfare of the United States.[1] The attorney-general, after citing this provision, continues (p. 65):

> Congress has power, therefore, to levy duties for the purpose of providing for the general welfare of the United States. Is the provision for the payment of bounty to sugar-producers, above set forth, "for the general welfare"?

If this is the issue in the case, the importers are at once out of court. If, as this position apparently assumes, Congress has power to expend taxes for anything which, in its judgment, is "for the general welfare," then the court will assuredly not attempt to control the specific exercise of that power in any given case. Granted a power, the propriety of its exercise is obviously of legislative concern.[2] If Congress, on the contrary, as the importers

[1] Gibbons *v.* Ogden, 9 Wheat. 199; Miller, Const., p. 231; 1 Story, Const., § 907.

[2] Talbot *v.* Hudson, 16 Gray, 417, 421.

claim, can only spend or raise taxes for a public purpose, the court may reasonably be called upon to pass upon the public nature of the purpose in this case. It at once follows from the attorney-general's position in its unqualified form that there is practically no limitation whatever upon the constitutional power of Congress to raise and appropriate taxes. Clearly the limitation, if any, is that claimed by the importers. The power is either unlimited or it is limited by the requirement that the taxation must be for a public purpose. What other can there be?

> Certainly, there is no more constitutional authority for paying men to tap a maple and boil its sap, or to raise cane, than there is to raise hay, potatoes, corn, or cabbage. If the taxes constituting the funds in the national treasury can be collected and disbursed to compensate a man for making sugar, they can be for making brick or any other manufacture. There can be, in such case, no limit to the extent to which monies raised by taxation can be appropriated to the individual benefit of preferred citizens, and in the encouragement of their private enterprises, and to their personal gains.[1]

This case is largely one of first impression, but we are not left without landmarks. It is certain that the attorney-general's contention, in this broad form, is not in accordance with recognized authority. The power to tax "for the general welfare" is not unlimited. Judge Story (1 Story, Const., § 990) asks and answers this precise question.

> Have Congress a right to raise and appropriate the public money to any and to every purpose according to their will and pleasure? *They certainly have not.*

In the Topeka case (20 Wall., p. 663, top) Mr. Justice Miller, it will be noted, declares, as to this taxing power, that

> The theory of our governments, State *and National*, is opposed to the deposit of unlimited power anywhere.

In his lectures, the same jurist has amplified the idea that the federal power of taxation, instead of being free from limitations imposed upon State taxation, is really much more circumscribed than that of the States:

> The general government can levy taxes, but they must be for a defined purpose, such as the payment of the public debt, or of the army

[1] Brief of Messrs. Stanley, Clarke, & Smith, p. 51. See also Turner *v.* Nye, Mass. S. J. C., 28 N. E. Rep. 1048, 1050.

and navy of the United States. It has no right to raise money by taxation for religious purposes, or for a thousand things for which the State may impose taxes, and collect them of the people. (Lectures on Const., 104, 247.)

A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. (1 Story, Const., § 922.)

The power to lay taxes is a power exclusively given to raise revenue, and it can constitutionally be applied to no other purposes. The application for other purposes is an abuse of the power; and, in fact, however it may be in form disguised, is a premeditated usurpation of authority. (1 Story, Const., § 963.)

To Judge Story, the suggestion that this power to levy taxes for the general welfare was an unlimited one seemed entirely absurd.

To consider the latter phrase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. (1 Story, Const., § 926.)

It may be observed further that in several at least of the cases of State taxation, the State legislature was expressly empowered to legislate for "the general welfare.[1]"

2. *State Authorities do not apply.*

It is clear that this is a necessary part of the government's contention. The ground for it appears on page 67 of the government's brief, and can perhaps best be stated by the attorney-general himself:

We respectfully submit that they (the State decisions) have no application to this controversy. They are all of them cases of municipal taxation, which must be for public municipal purposes. It is obvious that the establishment of a particular industry in one place by a bonus to specified private individuals is a very different object for taxation than the encouragement by the national government of a widespread industry in many quarters of the Union for national purposes, with a view to diversifying the industries of the country and making it independent of other countries for necessities.

[1] Const. Massachusetts, Pt. II. Ch. 1, Sec. 1, Art. 4; Const. Maine, Art. IV. Pt. 3, § 1; Const. New Hampshire, Pt. 1, Art. 31; Pt. 2, Art. 5; Const. of Georgia, Art. III. Sec. 7, § 22.

In support of this contention, the attorney-general quotes from Cooley on Taxation (2d ed., p. 108), as follows:

> In considering the legality of the purpose of any particular tax, a question of first importance must always concern the grade of the government which assumes to levy it. The "public" that is concerned in a legal sense in any matter of government is the public the particular government has been provided for; and the "public purpose" for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. There may, therefore, be a public purpose as regards the Federal Union, which would not be such as a basis for State taxation, and there may be a public purpose which would uphold State taxation, but not the taxation which its municipalities would be at liberty to vote and collect. . . . The grade of the government is also important for another reason. A municipal government is one of delegated and limited powers, whose authority will receive a somewhat strict construction, rendering it necessary that it shall find the purposes for which it may tax clearly and unmistakably confided to its charge by the State. . . . It is otherwise with the State, which *has all the power of taxation* not withheld from exercise in the making of the State and Federal Constitutions, and in support of whose action, consequently, the most liberal intendments are to be made. It is otherwise with the Federal Union also; for *though its powers are not general like those of the State*, but are limited and defined by the Federal Constitution, yet as they concern the most important matters of government, and relate to subjects not of domestic concern merely, but of international intercourse, and to other matters which sometimes call for broad and comprehensive views, and make a policy of liberal expenditures wise and statesmanlike, it would be neither reasonable nor prudent to subject its action in the matter of taxation to critical rules. That which it decides to be *an object of public expenditure* must generally be so accepted, and error in its action must be corrected by discussion and through public opinion and the elections.

The attorney-general rests this branch of his case upon the foregoing extracts. It seems by no means clear that they are altogether favorable to his view. It is pertinent to observe that the State authorities which are said to "have no application" are by no means "all of them cases of municipal taxation." It is true that the taxation in question was to be made by the machinery of towns, cities or counties. But, *in every instance*, the taxes were imposed under express authority of the States, which are said to have "all the power of taxation not withheld from exercise in the making of the State and Federal Constitutions."[1] It sufficiently appears, also, from the extracts in question, that, in the opinion of the writer, Federal taxation, like State taxation, must be for a

[1] See also U. S. *v.* Railroad, 17 Wall. 322, 329.

"public purpose," and further that, on account of the limited powers of the general government and the large "reserved powers" of the States, the number of the objects for which the State can tax is largely in excess of the fewer, though possibly more generally important, objects for which the federal government may do so.

Indeed, the proposition that federal taxation must be for a public purpose is substantially agreed to by the attorney-general in the very next paragraph of his brief (p. 69):

> The difference between what constitutes a "public purpose" for a municipality *and for the government of the United States* is illustrated, etc.

If this be so, it is not perceived why the State authorities are not strictly applicable. These cases not only declare that all taxation is necessarily limited to "public purposes," but limit the meaning of that phrase by a broad and general definition; viz., that to confer direct pecuniary benefits upon an industry or individual for the sake of an incidental or resulting general advantage is not a "public purpose." The relation of the State courts to their State constitutions is substantially the same as that existing between the federal Supreme Court and Congress. And it is to be observed further that the State decisions frequently treat such legislation, independent of constitutions, as being *in violation of natural right.* There are limitations imposed upon the legislature "by the general principles supposed to limit all legislative power." (Bartemeyer *v.* Iowa, 18 Wall. 129, 132.) It would seem that natural rights must be the same, whether against legislation by Congress or by the legislature of the State.[1]

This is especially important in view of the fact that Congress can do nothing which the Constitution does not first sanction. If a power be denied to the State, *a fortiori* it may be presumed to have been denied to Congress.[2]

In defining the meaning of the limitation imposed upon the congressional power of taxation, viz., "public purpose," and in defining the natural rights of the citizen under any government, it seems difficult to avoid the force of the State decisions.

[1] Calder *v.* Bull, 3 Dall. 386; Wilkinson *v.* Leland, 2 Peters, 627, 657; Gunn *v.* Barry, 15 Wall. 610, 623; Hammett *v.* Phila., 65 Pa. St. 146, 151.

[2] 1 Story, Const. § 909; Calder *v.* Bull, 3 Dall. 386; U. S. *v.* Cruikshank, 92 U. S. 542, 550, 551.

3. *Congressional Action.*

The contention that "public purpose" for the taxation by Congress means something different than the same phrase when applied to State taxation is sustained, in the opinion of the attorney-general, by instances in which Congress has expended moneys for bounties to people in this and other countries. The list is taken from a speech of Senator Daniel on the Blair Educational Bill (21 Cong. Record, pt. 3, 2295) in 1890. There are about forty instances cited, of which thirty-three are for the relief of sufferers by fire, earthquake, including one at Venezuela, Indian depredations, overflow of the Mississippi and Ohio rivers, cyclones, yellow fever, grasshoppers, lack of seed by failure of crops, or from accidents at arsenals.

Congress has also appropriated money to transport supplies to Ireland (9 Stats. at Large, 207; 21 *Ibid.* 303), to the South (14 Stats. at Large, 567; 15 *Ibid.* 24), to France and Germany (16 Stats. at Large, 596), usually in government vessels.

It will be observed that these are all matters of national charity, were not judicially examined or even seriously challenged in debate, and were never for large amounts. They were from funds already in the Treasury. The excellence of their objects, and the fact that no one in particular cared to, or could, bring the matter to the attention of the court, seem at least partially to explain these instances of national generosity. Logically considered, they tend to prove, so far as they prove anything, that the power of Congress to tax is absolutely unfettered. For example, to either a narrow or latitudinarian constructionist of the Constitution, it would be difficult to prove that taxation for sending food to sufferers by earthquake in Venezuela was for the "general welfare of the United States."

To these instances may perhaps be added the "codfish bounty" (1 Stats. at Large, 229), practically a drawback upon the duty on salt, and various other drawbacks under different revenue statutes.[1] It may be observed as an interesting fact that these Acts are frequent during periods of "protective" tariffs, as 1804--1847 or 1863–1890, while there are no instances of this sort of legislation in the period of "revenue tariff," between 1847 and 1861; and further

[1] See 6 Stats. at Large, 13; 1 Story, Const., § 991; 3 Hamilton's Works, p. 192; 3 Madison's Works, 636–648; 1 Stats. at Large, 387; 2 Stats. at Large, 84; 3 Stats. at Large, 36; 21 Cong. Record, p. 9592; 1 Stats. at Large, 27.

that the doctrine, which has never reached the court, has not been passed without challenge by the Executive on several occasions. In 1887, for example, when Congress passed an Act to distribute seeds to the drought-stricken counties of Texas, with an appropriation, the President vetoed it, assigning as a reason:

> I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the general government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that, though the people support the government, the goverment should not support the people.

These instances of national charity relied on by the attorney-general, repay examination. They are thus characterized by the importers counsel at page 22 of their "Reply."

> An exchange of lands; the use of a national vessel; slight extensions of existing debts; small donations of food, or its purchase (in trifling amounts) from funds already in the public treasury, to be given to foreign or domestic sufferers by earthquake, flood, or fire, or to those to whom the grasshopper had become a burden — evading judicial scrutiny, they prove nothing as to the constitutionality of the present act.

4. Protective Taxes.

The government say (p. 75):

> It is too late, in this year of grace 1891, for litigants to argue that the encouragement of diversified industries is not a national purpose, and, so far as Congress is concerned, therefore a public purpose. . . . We do not propose to spend further time in a discussion of their (*i.e.* of "protective" laws) validity. It is an issue long since finally settled. The principle thus established necessarily justifies bounties, for, in the beginning of the operation of a protective tariff, the amount of duty levied is a bounty to the domestic manufacturer, and it is with a view to such a benefit for him that it is levied. The sugar duties have always had the effect of a bounty to domestic sugar-producers. . . . The removal of duties would absolutely destroy fifty or sixty million dollars' worth of property invested in this industry and protected by the duties. To enable persons whose property would be thus injuriously affected to prepare for the change, the government was under a moral obligation to reimburse them for their loss, or to permit them by a bounty to continue the business until such time as the business might be self-sustaining. (p. 84.)

From the acquiescence of the nation during the periods of "protection" under the tariffs of 1789, 1812, 1816, 1824, 1828,

1842, and under the war tariffs of 1861, 1867, 1874, and 1883 (though the acquiescence has not been without periods of successful opposition), the attorney-general argues that indirect, *i.e.*, "protective," bounties are a "public purpose." (Loan Association *v.* Topeka, 20 Wall. 655, p. 664.) It may be conceded that the increases of price on domestic goods caused by a "protective" tariff are substantially a bounty to the domestic manufacturer, and that in case of a prohibitory tax the distinction between "protection" and "bounty" is extremely slight. But it may be noted that so good a constitutional authority as Madison (4 Elliott's Debates, 2 Phila. ed. 1876, 525, 526) held that a "protective" tariff was constitutional, and a bounty beyond the power of Congress. Judge Hare (1 Const. Law, 244) regards this as absurd, and suggests that

> Whether money shall be raised by taxation and then laid out in bounties, or purchasers shall be compelled to pay a higher price to manufacturers than they would have to give abroad, would seem to be merely a question of form.

With all respect to the authority of Judge Hare, there seems reason to believe that Madison is right. In the case of the bounty, the direct object is a private benefaction. In the case of State statutes, this would be void; for the public benefit is strictly incidental. In the case of all "protective" taxes, the statute under which they are imposed is ostensibly to raise revenue.[1] Even the Act of October 1, 1890, called the "McKinley Bill," of which the Committee on Ways and Means in their report (Report No. 1466, Fifty-first Congress, first session) say, "The general policy of the bill is to foster and promote American production and diversification of American industry," styles itself "An Act *to reduce the revenue* and to equalize the duties upon imports, and for other purposes." The direct, apparent purpose of all these Acts is to raise revenue — an unquestioned public purpose. Any indirect bonus taken, by the arrangement of the schedules, from the consumers of certain articles, and transferred to their producers, is a purely incidental purpose. In adjusting its taxes, Congress is exercising an undoubted power. In so doing, it may benefit some industries and crush others. But these results are incidental, even if intentional, and the remedy, if any is needed,

[1] See, however, 1 Stats. at Large, 24.

is political. To impeach the constitutionality of a revenue statute which must make some incidental private benefits, on the ground that Congress has at the same time tried to do something else which is beyond its power, would be a hopeless task. But a bounty is perhaps a different matter. Here money is raised and directly given away to encourage private individuals to continue or increase their otherwise unprofitable business "until such time as the business might be self sustaining." Apparently, therefore, the question in the matter of bounties is not concluded by any previous acquiescence in "protective" taxes, even considering the latter as a colorable abuse of an unquestioned power.

This is, moreover, the first case in which the constitutionality of a congressional bounty, whether direct, as here, or indirectly by "protection," has been before the court for decision. Until the opportunity for raising the question is presented, until "an individual is brought into the point of collision, and the clouds surcharged with the great forces of the public welfare burst over his head," [1] there is no presumption of legality from delay.[2]

There seems, therefore, slight reason to doubt that the importers are in season to be heard carefully by the court in the consideration of this question.[3] It is a question which, as we have said, merits and will receive an attention commensurate to its far-reaching consequences. If the line is not drawn at this point, it is difficult to say where it can logically be drawn. Vast interests of all kinds are involved in limitations of taxation; for, as was grimly said by the leading American jurist, [4] "The power to tax involves the power to *destroy*."

Charles F. Chamberlayne.

BOSTON, Jan. 23, 1892.

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[1] Hon. W. M. Evarts, Defence of President Johnson, 2 Impeach., p. 269.

[2] Gross *v.* Rice, 71 Me. 241.

[3] Cooley, Taxation, 46, 55, 104; Marbury & Madison, 1 Cranch, 177; Sedgwick, Stat. Law, 414; Hurtado *v.* California, 110 U. S. 516, 536.

[4] Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. 341.